IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

JOSEPH A. and SANDRA S. BACUS, husband and wife, Appellants, v. STANLEY W. and CATHERINE ANDERSEN, husband and wife, Respondents.	No. 37772-1-II UNPUBLISHED OPINION

Van Deren, C.J. — Joseph and Sandra Bacus appeal the trial court's summary judgment order in favor of Stanley and Catherine Andersen upholding Skamania County's 1989 approval of a subdivision short plat affecting real property belonging to both parties and denying Bacuses' request to quiet title to easements on the Bacuses' land. We hold that the Bacuses' challenge to the 1989 short plat approval (1) concerns a land use decision and is not properly the subject of a quiet title action, (2) is untimely under former RCW 58.17.180 (1983), and (3) is not subject to the Land Use Petition Act, chapter 36.70C RCW. We affirm the trial court's summary judgment order based on the Bacuses' untimely challenge under RCW 58.17.180 (1983) and award attorney fees and costs to the Andersens.

FACTS

In 1966, Stanley Andersen and his former wife, Patricia,[1] purchased approximately 30 acres in Skamania County located between Highway 14 to the north and the Columbia River to the south. Stanley submitted a short plat application to divide the property into four lots in 1987. The short plat became known as the Patricia Andersen Short Plat (short plat). The U.S. Forest Service approved the short plat application after determining that it was consistent with the Columbia River Gorge National Scenic Area Act.[2] In June of 1989, Skamania County approved and recorded the short plat.

Stanley applied for the short plat intending to create two easements across lot 3—one across the western portion to provide access to lot 2 and a second across the eastern portion of lot 3 to sever the "Remainder Lot." Clerk's Papers (CP) at 91. The face of the short plat map describes Patricia Road as providing access to lots 2 and 3 and also describes a roadway easement providing access across lot 3 to the remainder lot. On June 29, 1989, Stanley and Patricia recorded a Private Roadway Agreement indicating that all the roadways shown within the short plat's boundaries were to be considered private roadways, retained by "the property owners of said [property] division." CP at 59.

On July 28, 1989, Stanley conveyed lot 3 to Patricia in accord with a divorce decree. In turn, Patricia conveyed lot 3 to David Prosser. The Andersen-Prosser deed expressly incorporated the recorded short plat map and stated that the conveyance was subject to the

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[1] Because Stanley and Patricia Andersen share the same last name, we refer to them by their first names for clarity. In doing so, we mean no disrespect.

[2] Former 16 U.S.C.A. §§ 544-544p (1986).

Private Roadway Agreement and the easement described on the short plat for a roadway along the easterly lot line. On December 13, 1995, Prosser conveyed lot 3 to the Bacuses. This deed also incorporated the short plat, the Private Roadway Agreement, and the "easements alon[g] the Westerly Line and the Easterly Line, as shown on the [short] plat." CP at 62.

The Bacuses filed this lawsuit on July 30, 2002. They titled their complaint "Petition to Quiet Title" but the relief they sought was to invalidate the short plat and to have the easements shown on the plat declared invalid. Although the Bacuses named Skamania County as a defendant,[3] they failed to properly serve it and Skamania County is not a party to this case. The Andersens answered the Bacuses' claims, asserting counterclaims to quiet title and injunctive relief to prevent the Bacuses from denying the Andersens' use of Patricia Road.

The parties filed cross motions for summary judgment. The Bacuses also filed an additional cross motion for summary judgment with multiple exhibits. They also filed several other pleadings, including (1) a motion to admit documents "pursuant to CR 36,"[4] (2) a motion to dismiss the Andersens' summary judgment motion, and (3) a "motion in limine to more closely define issues and for partial judgment." CP at 139, 144 (emphasis omitted).

The trial court granted summary judgment to the Andersens and denied the Bacuses' motion for summary judgment, concluding that their petition was not timely filed under either

[3] A copy of the Bacuses' amended complaint naming Skamania County is not part of the record on appeal.

[4] CR 36 is the rule regarding requests for admission. According to the Andersens, neither party served requests for admission.

the Land Use Petition Act (LUPA)[5] or the former writ process for land use and permit challenges.[6] The trial court expressly found that the easements and private roads depicted on the short plat were valid. The Bacuses unsuccessfully moved for reconsideration.

The Bacuses appeal.

ANALYSIS

I. Standard of Review

When reviewing an order on summary judgment, we make the same inquiries as the trial court. *Cowlitz Stud Co. v. Clevenger*, 157 Wn.2d 569, 573, 141 P.3d 1 (2006). We consider all the facts and reasonable inferences in the light most favorable to the nonmoving party. *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008). We consider all legal questions de novo. *Cowlitz Stud Co.*, 157 Wn.2d at 573. Summary judgment is appropriate if "there is no genuine issue as to any material fact" and the moving party shows that he or she is "entitled to a judgment as a matter of law." CR 56(c). "A genuine issue of material fact exists where reasonable minds could differ on the facts controlling the outcome of the litigation." *Ranger Ins. Co.*, 164 Wn.2d at 552.

"The moving party is entitled to summary judgment if it submits affidavits establishing it is entitled to judgment as a matter of law." Consequently, "[t]he nonmoving party avoids summary judgment when it 'set[s] forth specific facts which sufficiently rebut the moving party's

[5] LUPA is codified in chapter 36.70C RCW. LUPA provides relief for individuals aggrieved or adversely affected by a land use decision, RCW 36.70C.060, and "[c]learly, [LUPA] applies to review of subdivision plat applications." 17 William B. Stoebuck & John W. Weaver, Washington Practice: Real Estate: Property Law § 5.6, at 295 (2d ed. 2004).

[6] Former RCW 58.17.180 (1983).

contentions and disclose the existence of a genuine issue as to a material fact.'" *Ranger Ins. Co.*, 164 Wn.2d at 552 (alteration in original) (quoting *Meyer v. Univ. of Wash.*, 105 Wn.2d 847, 852, 719 P.2d 98 (1986)). "[T]he nonmoving party 'may not rely on speculation [or] argumentative assertions that unresolved factual issues remain.'" *Ranger Ins. Co.*, 164 Wn.2d at 552 (alteration in original) (quoting *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986)).

II. Land Use, not Quiet Title Action

The Bacuses contend that the trial court erred by applying land use principles to their "quiet title action." Br. of Appellant at 6. "An action to quiet title allows a person in peaceable possession or claiming the right to possession of real property to compel others who assert a hostile right or claim to come forward and assert their right or claim and submit it to judicial determination." *Kobza v. Tripp*, 105 Wn. App. 90, 95, 18 P.3d 621 (2001). Here, the dispute stems from two easements that cross the Bacuses' lot and allow access to neighboring lots that were approved by Skamania County in 1989. The Bacuses argue that the "Short Plat and the easement[s] it purported to create on Patricia Road are null and void and of no legal force or effect." CP at 4. Thus, the Bacuses challenge approval of the Stanley's 1987 short plat application, substantively a land use matter, not a quiet title issue, and we address Skamania County's 1989 approval as a land use decision.

III. Subdivision Short Plat

Although the trial court concluded that LUPA applied to the Bacuses' claims, it also evaluated the claims under pre-LUPA law and determined that the challenge was also untimely

under pre-LUPA law. We can affirm the trial court on any basis supported by the parties' pleadings and the proof. *Niven v. E.J. Bartells Co.*, 97 Wn. App. 507, 513, 983 P.2d 1193 (1999). We hold that the writ process, not LUPA, governs the Bacuses' land use challenge and we reach the same conclusion as the trial court; that the Bacuses' challenge to the 1989 short plat's validity is untimely.

A. Governing Law

Until 1995, an aggrieved party in a land use proceeding could appeal the decision through a writ of review. RCW 58.17.180 (1989); *Horan v. City of Federal Way*, 110 Wn. App. 204, 208, 209 n.11, 39 P.3d 366 (2002). But in 1995, our legislature adopted LUPA "to reform the process for judicial review of land use decisions made by local jurisdictions, by establishing uniform, expedited appeal procedures and uniform criteria for reviewing such decisions, in order to provide consistent, predictable, and timely judicial review." RCW 36.70C.010. Thus, LUPA replaced the writ with a petition process.

"'A statute operates prospectively when the precipitating event for [its] application . . . occurs after the effective date of the statute, even though the precipitating event had its origin in a situation existing prior to the enactment of the statute.'" *Heidgerken v. Dep't of Natural Res.*, 99 Wn. App. 380, 387-88, 993 P.2d 934 (2000) (alteration in original) (internal quotation marks omitted) (quoting *State v. Belgarde*, 119 Wn.2d 711, 722, 837 P.2d 599 (1992)). The event that triggers the application of LUPA's provisions is the "land use decision." RCW 36.70C.060. These events include final determinations on an "application for a project permit or other governmental approval required by law before real property may be improved, developed,

modified, sold, transferred, or used." RCW 36.70C.020(1)(a). Here, the 1989 short plat approval is the precipitating land use decision, which occurred well before LUPA's effective

date, and the writ of review process governs its review.[7]

B. Writ of Review

The Bacuses filed suit in July 2002, roughly six and one half years after they purchased their lot and thirteen years after Skamania County approved and recorded the short plat. The deed to the Bacuses' property incorporated the short plat, describing their parcel as, "Lot 3 of the Patricia Andersen Short Plat," subject to the "Easements alon[g] the Westerly Line and the Easterly Line, as shown on the [short] plat." CP at 62.

Under former RCW 58.17.180, "[a]pplication for a writ of review shall be made to the court within thirty days from any decision so to be reviewed." Here, because there is no dispute that the Bacuses filed their challenge to the short plat well beyond the 30 day limit, we hold that the trial court did not err in granting summary judgment to the Andersens based on the time limitation for challenges to plat approval under former RCW 58.17.180.

C. Other Arguments

The Bacuses nevertheless argue that the approved short plat is illegal because (1) the Skamania County Assessor never gave written approval required for the county auditor to record the short plat and (2) the county sanitation department never "guarantee[d] . . . potable water [or] acceptable on site sanitary waste disposal" on lot 2. Br. of Appellant at 17.

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[7] Furthermore, legislative intent controls whether a statute has retroactive or prospective application. *Pape v. Dep't of Labor & Indus.*, 43 Wn.2d 736, 741, 264 P.2d 241 (1953). Absent legislative direction to the contrary, we presume that statutes apply prospectively and disfavor retroactivity. *Heidgerken*, 99 Wn. App. at 387. Here, because LUPA provided a comprehensive process for appealing and reviewing land use decisions made by local jurisdictions, the legislature indicated its intent that the statute apply prospectively because it materially changed the law. *See State v. Bell*, 8 Wn. App. 670, 674, 508 P.2d 1398 (1973). Accordingly, we decline to apply LUPA or its statute of limitations retrospectively.

But the short plat itself states, "This short plat is approved pursuant to County and State laws" and, thus, complies with the statutory requirement that a county give written approval on the face of the plat. CP at 91 (emphasis omitted). The Skamania County Assessor explained that his office "does not provide a note to the Skamania County Auditor's Office asserting that a short plat has been legally divided" and the county auditor agreed. CP at 110. Moreover, despite the Bacuses' bare assertion that one or more county agencies or departments withheld their approval of this short plat, nothing in the record supports this contention.

In their reply brief, the Bacuses raise several arguments not included in their opening brief, including arguments that the deeds were prepared by a title company. Because arguments raised for the first time in a reply brief will generally not be considered, we decline to consider them here. *See* RAP 10.3(c).

IV. Easements

The Bacuses also argue that the Andersens failed to acquire an easement across the Bacuses' land. We disagree.

"[N]o particular words are necessary to constitute a grant of easement. '[A]ny words which clearly show the intention to give an easement . . . are sufficient to effect that purpose, providing the language is sufficiently definite and certain in its terms.'" *McPhaden v.Scott*, 95 Wn. App. 431, 435, 975 P.2d 1033 (1999) (alteration in original) (quoting *Beebe v. Swerda*, 58 Wn. App. 375, 379, 793 P.2d 442 (1990)). "A party may create private easements by including the donation or grant in a plat or short plat."[8] *M.K.K.I., Inc. v. Krueger*, 135 Wn. App. 647, 653,

[8] "Washington law is quite explicit that dedications may be made by showing them on the face of the plat; by statute the plat operates 'as a quitclaim deed' for dedications so depicted." 17 William B. Stoebuck & John W. Weaver, Washington Practice: Real Estate: Property Law § 5.2,

145 P.3d 411 (2006). "If possible, the intent of the applicant is ascertained from the plat itself." *M.K.K.I., Inc.*, 135 Wn. App. at 654.

Here, the short plat reads, "Patricia Road (private) to provide access to lots 2 & 3." In another place, it says, "Roadway easement for remainder of property." CP at 57 (emphasis omitted). This comports with statutory requirements that state, in part:

> Roads not dedicated to the public must be clearly marked on the face of the plat. Any dedication, donation or grant as shown on the face of the plat shall be considered to all intents and purposes, as a quitclaim deed to the said donee or donees, grantee or grantees for his, her or their use for the purpose intended by the donors or grantors as aforesaid.

RCW 58.17.165.

Moreover, "[t]he intent of the plat applicant determines whether a plat grants an easement." *M.K.K.I., Inc.*, 135 Wn. App. at 654. The plat applicant, Stanley, explained that:

> One of the County's requirements was for me to show, on the face of the Short Plat Map, the easements that existed to provide legal access to each of the parcels. I intended for Patricia Road to provide access to Lots 2 and 3. Patricia Road already existed at the time the [Short] Plat was approved and provided access to the house that Patricia and I built in 1966. I intended to have Patricia Road provide access to Parcel 2.

CP at 52.

In *M.K.K.I., Inc.*, property owners recorded two short plats with the county auditor. 135 Wn. App. at 650. These short plats showed an easement running through the various lots and describe the easement as "'access ease, utility ease, [and] well access ease.'" One of the short plats also described the easement as, "'Benefit Lot 1B, 3A.'" *M.K.K.I., Inc.*, 135 Wn. App. at 651 (alteration in original) (quoting *M.K.K.I., Inc.* CP at 84, 87). But shortly before deeding the

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at 278 (2d ed. 2004) (quoting RCW 58.17 165).

lot, the owners attempted to vacate the easements by quit claiming the easements to themselves. *M.K.K.I., Inc.*, 135 Wn. App. at 649. The dominant estate's purchaser and Yakima County brought an action for declaratory judgment, seeking to nullify the quit claim deeds and quiet title to easements shown in these short plats. *M.K.K.I., Inc.*, 135 Wn. App. at 649-50. The trial court granted summary judgment for the dominant estate's purchaser and Yakima County. *M.K.K.I., Inc.*, 135 Wn. App. at 649. Division Three affirmed and held that the language on the short plats was sufficient to create two easements. *M.K.K.I., Inc.*, 135 Wn. App. at 649, 656-57.

The language used by Stanley on the short plat is similar to the language in *M.K.K.I., Inc*. *See* 135 Wn. App. at 651. Both include the words "easement" and "access" and the applicant here testified that he intended to grant an easement benefitting the other lots. Therefore, we hold that the trial court did not err in granting summary judgment to the Andersens because the evidence established that the disputed easements were properly created and recorded.[9]

B. Adverse Possession

The Bacuses next argue that they adversely possessed the disputed easements. But the Bacuses failed to raise this theory in their complaint and only raised it after the trial court dismissed their case. RAP 9.12 provides that "[o]n review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court." Therefore, we do not review this argument on appeal.

V. Attorney Fees

[9] The Bacuses also argue that the Private Roadway Agreement is insufficient to create easements across their land. They point to a document entitled a Revocation of Roadways, signed by the Bacuses, purporting to "limit[] the use of these roadways to the Bacus[es] alone." Br. of Appellant at 11. But because we hold that the short plat itself created the easements, this argument is without merit.

The Andersens argue that we should award them attorney fees under RCW 4.84.370. "[P]arties are entitled to attorney fees only if a county, city, or town's decision is rendered in their favor and at least two courts affirm that decision. The possibility of attorney fees does not arise until a land use decision has been appealed at least twice." *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 413, 120 P.3d 56 (2005); RCW 4.84.370. The Bacuses did not appeal Skamania County's land use decision until thirteen years after it granted Stanley's short plat application, which accrued to the Andersen's benefit. But two courts have now affirmed Skamania County's decision to grant the plat application providing for the easements and road across the Bacuses' lot. Thus, we award the Andersens attorney fees under RCW 4.84.370.

The Andersens also argue that the appeal is frivolous and that they are entitled to attorney fees and costs under RAP 18.1 and RAP 18.9. "An appeal is frivolous if there are no debatable issues upon which reasonable minds might differ and it is so totally devoid of merit that there [is] no reasonable possibility of reversal." *Fay v. Nw. Airlines, Inc.*, 115 Wn.2d 194, 200-01, 796 P.2d 412 (1990). We resolve all doubts against finding an appeal frivolous after considering the record as a whole. *Delany v. Canning*, 84 Wn. App. 498, 510, 929 P.2d 475 (1997). Here, we also grant attorney fees and costs to the Andersens under RAP 18.1 and RAP 18.9 because the Bacuses have raised no debatable issue that would create a reasonable possibility of reversal and, subject to the Andersens' compliance with RAP 18.1, a commissioner of our court shall award fees and costs to the Andersons.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the

Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Van Deren, C.J.

We concur:

Quinn-Brintnall, J.

Penoyar, J.